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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1943

No. 77

WILLIAM W. McGREGOR, PERRY SHILTON, LOUIE HESS, ET AL.,

Petitioners,

vs.

THE UNITED STATES.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF CLAIMS.

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To the Honorable, the Supreme Court of the United States:

Petitioners pray for the issuance of a writ of certiorari to review a judgment of the Court of Claims of the United States entered December 7, 1942 (R. 24). Motion for New Trial was denied March 1, 1943 (R. 34).

Jurisdiction.

The jurisdiction of this Court is invoked under Section 3 (b) of the Act of February 13, 1925, as amended by the Act of May 22, 1939, C. 140, 53 Stat. 752.

Decisions of Court Below.

The opinion of the Court below awarding judgment to the Respondent is contained in the record at Page 28; and the further opinion of the Court below denying Motion for New Trial may be found in the record at Page 34.

Summary Statement of Matter Involved.

On August 14, 1937, the Congress by statute conferred jurisdiction upon the United States Court of Claims to entertain and render judgment on the claims of William W. McGregor, Jack Wade, Perry Shilton, Louis Hess and Owen Busch. The claims sounded in tort for injuries resulting from a collision wherein petitioners sustained personal injuries when struck by a Civilian Conservation Corps truck on the public highway in Mesa Verde National Park, Colorado. Thereupon each of the petitioners timely instituted suit in his own right against Respondent (R. 1, 6, 10, 15, 20).

As in the average negligence case, the issues centered about the determination of liability and the extent of the damages. Petitioners were driving along the highway, returning from work in an automobile owned and driven by the petitioner, McGregor, and in which the other petitioners were passengers, when they were struck by the Respondent's truck. The testimony was in great conflict as to fault. Some seventeen hundred pages of testimony were taken before Commissioners of the Court of Claims of the United States. Proposed findings of fact were filed by each side and on April 25, 1942, the Report of the Commissioner was filed containing his Findings of Fact.

The Commissioner made findings of fact of a basic and underlying nature under the evidence adduced before him. The underlying facts so found related in general to the situs of the accident; the nature and speed of the colliding

vehicles; topography; condition and nature of the highway; time, visibility and other physical features; the occupants of the vehicles, their relation to each other, and the weight, contents and other characteristics of the vehicles; distances of the vehicles from each other and their position prior to the time of the impact; positions of the vehicles and location of the highway at the time of the impact; and position and location of the vehicles after the impact.

Appropriate record references are not included in the foregoing paragraph for the reason that under a long-standing custom the Court below will not permit the inclusion of the Commissioner's report in a certified transcript of the record prepared for use in this Court. Therefore, petitioners are at this time unable to include within the certified transcript of record the very Commissioner's report upon which they rely. Attention is respectfully invited to the prayer which serves as the concluding paragraph of this Petition wherein we specifically pray that if this Court determines to grant a Writ of Certiorari in the present causes the transcript of record be made to include the Commissioner's report.

From these basic facts the Commissioner made findings of ultimate fact. In particular, the Commissioner found that the driver of Respondent's truck was negligent in that he failed to exercise reasonable care under the circumstances, and further found that petitioners were free from contributory negligence.

The Commissioner then made findings with respect to the extent of the injuries, detailed losses incurred by each of the petitioners, and awarded damages to each of the petitioners in the following amounts: McGregor $2875.00; Wade $7500.00; Shilton $6500.00; Hess $6500.00; and Busch $4000.00.

Respondent filed exceptions to the report of the Commissioner on May 25, 1942. Petitioners filed a Brief on July

1, 1942, and Respondent filed a Request for "Special Findings of Fact" and Brief on July 31, 1942, and the cases came on for hearing before the Court of Claims of the United States on October 8, 1942.

In a three to two decision of December 7, 1942, the Court below repudiated the findings of the Commissioner and ordered judgment entered for the Respondent (R. 34). The majority (The Honorable Chief Justice Richard S. Whaley, and Honorable Associate Judges, Sam E. Whitaker and J. Warren Madden) made its own "special findings of fact" (R. 24), which for the greater part may be termed findings of underlying or basic facts, and then made findings of ultimate fact to the effect that Respondent's driver was free of negligence that proximately contributed to the accident, and that the petitioner, McGregor, the driver of the automobile in which petitioners were riding, was guilty of negligence which proximately contributed to the accident (R. 27). A conclusion of law was then entered, based on the so-called "special findings of fact", to the effect that petitioners were not entitled to recover, judgments rendered against the petitioners in favor of respondent, and petitioners assessed the cost of printing the records in these cases (R. 28). Judge Whitaker delivered the opinion of the court, an opinion which by its very language takes the evidence in the record, weighs it, both as to its accuracy and credibility—notwithstanding that not a single morsel of testimony had been heard by the Court en banc—and concluded that the petitions should be dismissed. Judge Jones, with Judge Littleton concurring, dissented (R. 33). To the minority the testimony was "hopelessly conflicting". Curiously enough, the minority felt that the "physical facts overwhelmingly support the testimony for the plaintiffs" (R. 34). Thus, putting aside the vital question involved when a reviewing body undertakes to determine to deter-

mine the credibility of witnesses whom it has not seen or heard, the minority found that under the physical evidence, with everything else out of the case, petitioners should have been granted recoveries and damages in the respective amounts set out in the findings of the Commissioner's report.

Plaintiffs filed a Motion for a New Trial (R. 34) and as the basis therefor laid two principal grounds:

(1) Error in repudiating and overturning the findings of the Commissioner who had heard the witnesses; and

(2) That Judge Whitaker had not disqualified himself as a Judge in the causes for the reason that he had been Government counsel in these very cases prior to his appointment to the Court below.

Ten copies of the Motion for New Trial are being furnished for the convenience of the Court as exhibits to this Petition.

Questions Presented.

I.

Is it not contrary to established law in the federal system for the Court of Claims of the United States to substitute its own findings of fact for those made by a Commissioner of that Court, where there is substantial evidence to support the findings made by the Commissioner and set forth in his report to that Court? Or, as specifically applied to the instant causes, is it not contrary to established principles for the Court of Claims of the United States in a case sounding in tort to pick and choose testimony from a record and draw inferences therefrom contrary to the facts and inferences found by a Commissioner who heard the testimony from the lips of witnesses and who examined the physical evidence incident to the issue involved? Is this not particularly true where the causes of action were

created by special acts of Congress, where the Court itself exists by reason of an Act of Congress, and where the Commissioner functions pursuant to acts of Congress? (See 28 U. S. C. A. Sec. 269.)

II.

Was it not improper for Judge Whitaker to sit as a Judge in the Court below in view of the fact that he had been Government counsel in these very cases prior to his appointment to the Bench of the Court below?

Reasons Relied Upon for Allowance of Writ of Certiorari.

I.

The Court of Claims of the United States has so far departed from the accepted and usual course of judicial proceedings as to call for this Court's power of supervision. Respondent must concede that the Court below substituted its own versions of the evidence for that of the Commissioner. In accordance with law and the established procedure outlined by Congress, a Commissioner was designated to hear the testimony in a cause sounding in tort, and the Commissioner was required to report the underlying and ultimate facts under all the evidence. Under Rule 40 of the Rules of the Court of Claims, which implements 28 U. S. C. A. Sec. 269, the basic and ultimate facts were found by the Commissioner. The Commissioner not only heard the testimony, but actually inspected the site of the collision and its environs. His report was filed with the Court below. It is respectfully submitted that the Court below was bounden to draw conclusions of law from the basic and ultimate facts so reported by the Commissioner *unless* the facts so found were not supported by substantial evidence and thus clearly erroneous. The language

of 28 U. S. C. A. Sec. 269 and of Rule 40 seems to contemplate that the Commissioner's findings shall be binding unless clearly erroneous. The Court below in its opinion does not state that the report of the Commissioner lacked substantial evidence with respect to the findings of fact therein embodied. Clearly from the language of the dissenting opinion it may be safely said that the findings were not clearly erroneous.

This is a case where the majority of the Judges in the Court below have seen fit to cull morsels and bits of testimony from the record, and thereupon repudiate the findings of the Commissioner, the nisi prius body specifically set up to take and weigh evidence, both as to its accuracy and credibility. To quote Mr. Justice Cardozo:

> "In fact, what the Court did was to make its own appraisal of the testimony, picking and choosing for itself among uncertain and conflicting inferences." *Federal Trade Commission v. Algoma Lumber Company, 291 U. S. 67, 73.*

Judge Jones of the Court below seems to have appreciated this when he pithily said "This is a fact case."

This Court well knows that under the Federal Rules of Civil Procedure, and under many decisions of this Court dealing with judicial review of determinations of fact by administrative bodies, the findings are not to be set aside unless clearly erroneous, and due regard is to be given to the opportunity of the trial body to judge of the credibility of the witnesses. See *Rule 52 of the Federal Rules of Civil Procedure; Adamson* v. *Gilliland*, 242 U. S. 350, 353; *Davis* v. *Schwartz*, 155 U. S. 631, 636; *Great Atlantic & Pacific Tea Co.* v. *Grosjean*, 301 U. S. 412, 420; *Borden's Farm Products Co.* v. *Ten Eyck*, 297 U. S. 251, 261; *Federal Trade Commission* v. *Algoma Lumber Company, supra.* We respectfully submit that this is the uniform rule throughout

the federal system and throughout the states. The question thus presented is whether or not this settled rule of law is to apply to the Court of Claims of the United States when it sits as a reviewing body over the Commissioners of that Honorable Court. We submit that the question is a most important one and should be settled at this time.

II.

We respectfully submit that the failure of Judge Whitaker to disqualify himself involves a question of a policy which this Court should consider and resolve. We feel that the question of disqualification is peculiarly germane to causes arising in the Court of Claims of the United States, a legislative court. As we understand, the practice and policy of disqualification followed in this Honorable Court and other courts is rooted in the determination that the administration of justice shall avoid even the appearance of unfairness and partiality. Counsel do not propose to belabor this proposition and respectfully refer the Court to the argumentation advanced in the Brief appended to the Motion for New Trial.

Wherefore, your petitioners respectfully pray that a Writ of Certiorari be issued by this Court, directed to the Court of Claims of the United States commanding that Court to certify and send to this Court, for its review and determination, a full and complete transcript of the record and all proceedings, including the Commissioner's report, in cases numbered and entitled on its docket, No. 43693, William W. McGregor, Plaintiff, versus The United States, Defendant; No. 43665, Jack Wade, Plaintiff, versus The United States, Defendant; No. 43695, Perry Shilton, Plaintiff, versus The United States, Defendant; No. 43664, Louis Hess, Plaintiff, versus The United States, Defendant; and No. 43666, Owen Busch, Plaintiff, versus The United States,

Defendant, and that the judgment of the Court below be reversed by this Court, and that your petitioners have such other and further relief in the premises as to this Court may seem just.

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